Supreme Court of the United States

OCTOBER TERM, 1946

No. 1469 119

FRANK W. FORD, as Trustee in bankruptcy of HARLEM GARMENT CENTER, INC., Bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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July 9th, 1947.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349

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Respondent argues (p. 6) that the test of an adverse claimant is whether he has presented "an arguable hypothesis as question of fact or of law." This is obviously not the test applied by *Harrison* v. *Chamberlin,* 271 U. S. 191, 195. It is, however, the test applied by the 2nd Circuit herein.

Respondent's contention (p. 8) that there is no difference between the reasoning of the 2nd Circuit herein and the reasoning of the 3rd, 7th and 8th Circuits in the cases cited in petitioner's main brief (pp. 12-16) is, of course, without basis in fact.

The 3rd, 7th and 8th Circuits have followed the test of *Harrison* v. *Chamberlin* (*supra*), namely– "Is (the claim) so unsubstantial and obviously insufficient either in fact or in law, as to be plainly without color of merit, and a mere pretense"?

The 2nd Circuit herein in its determination has followed its erroneous theory previously set forth in *Re Yorkville Coal Co.* (211 Fed. 619), which was based upon dictum in *Mueller* v. *Nugent*, 184 U. S. 1, 15.

Respondent in dealing with Rule 52(a) F. R. C. P. argues (pp. 7, 9) that the Referee is "not the ultimate trier of the facts". The contention is completely without merit. See Tit. 11, Sec. 11a (7) (15), 66 (6) U. S. C., as amended June 22, 1938, c. 575, Sec. 1, 52 Stat. 842, 857. (Sec. 2a (7) (15) and 38 (6) of Bankruptcy Act.)

Respondent has overlooked (p. 7, Respdt.'s Brief) in *Re Gallis*, 115 Fed. (2nd) 626, which while not referring to Rule 52(a) F. R. C. P. specifically, deals with the exact situation (pp. 15-16 Pet. Main Brief); and holds that the Referee's determination as to credibility, is to be upheld.

Respondent cites *Kansas City Journal-Post Co.* (*Boston* v. *Schapiro*), 144 Fed. 2nd, 812. In that case respondent with corroborating testimony in support of his claim had quite properly established himself as an adverse claimant. In the instant case Magee's one-line statement on the material issue was not only uncorroborated, but also was incredible (pp. 9-11 Pet. Main Brief).

Petitioner has not previously discussed *Cline* v. *Kaplan* (323 U. S. 97), referred to by respondent (p. 13, Respdt.'s Brief), as the applicable statements therein are dicta. The

question for determination therein was– Had the claimant made timely objection to the jurisdiction of the Court or had it been waived? But whether dicta or not, nothing in *Cline* v. *Kaplan* in any wise overrides *Harrison* v. *Chamberlin* (*supra*).

There are numerous statements in respondent's brief not supported by the record, the more flagrant being:— that Magee was nominal treasurer (p. 1); that Silverman was virtual owner (p. 2); that the Referee had prejudged the issue (p. 3); that Magee was corroborated by Golenbock and Casey in his claim that he would not make the advance unless and until he had received the promise of the Leahy check as reimbursement (p.9); that Magee did not have to endorse the corporate name because the check was not made out to the corporation (p. 3). To refute the implications contained in respondent's attempt to establish (pp. 4-6) that he was confused when first examined, would extend this reply brief unduly.

Conclusion

For the reasons heretofore set forth, it is respectfully submitted that the petition for writ of certiorari should be granted.

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July 9th, 1947.